No. 11013

In the United States Circuit Court of Appeals

For the Ninth Circuit

CHESTER BOWLES, ADMINISTRATOR, OFFICE OF PRICE ADMINISTRATION, APPELLANT

vs.

L. G. TRULLINGER, APPELLEE

APPELLEE'S BRIEF

Upon Appeal from the District Court of the United States for the District of Oregon.

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Upon Appeal from the District Court of the United States for the District of Oregon.

APPELLEE'S STATEMENT OF THE CASE

At the trial of this case Appellee urged that he was entitled to prevail on three grounds:

(1) Because any cause of action was not in the Plaintiff Administrator but in the purchaser of the property involved;

(2) Because the sale (which involved not only a tractor but other items of personal property) was not at a price in excess of the ceiling price imposed by Maximum Price Regulation No. 136, if it applied; and

(3) Maximum Price Regulation No. 136 did not apply to this sale.

Appellant's brief argues the first point only. The second and third points are entirely disregarded. In disregarding the second point Appellant has not only overlooked incontrovertible facts in the case but has materially departed from his theory of the case as outlined in his Statement of Points (R. 140-2).

The brief states that it was admitted in the pretrial order "that defendant sold *the tractor* for $2800". There was no such admission in the pretrial order (R. 7, par. (c)). The entire brief proceeds on the assumption that only a tractor was sold, and in conclusion the brief states (page 17) :

> "beyond any doubt the defendant in this case *sold the tractor* at a price higher than the maximum fixed by the Regulation, ..." (Italics added)

The evidence is clear, as will hereinafter be pointed out, that Appellee sold not only a tractor but several other items of personal property for the price of $2800. Appellant's counsel in preparing the record on appeal recognized that the sale involved was not only of a tractor but also of other personal property, because in each of their first six Statement of Points

they refer to the sale of the "tractor and other personal property". The fifth and sixth of the Statement of Points read as follows (R. 141):

> "5. That the District Court erred in failing to hold that the sale of tractor *and other personal property* was covered and governed by said Maximum Price Regulation No. 136.
>
> "6. That the District Court erred in finding that the price at which said tractor *and other personal property* was sold by the defendant to said Earl Gilmore, to-wit, $2800, was not in excess of the maximum price permitted by said maximum price regulation 136." (Italics added)

SUMMARY OF APPELLEE'S ARGUMENT

We summarize our argument as follows:

First: Prior to the amendment of June 30, 1944, not involved in this case, Sec. 205 (e) of the Emergency Price Control Act of 1942, 50 App. USCA Sec. 925 (e), provided that in case of violation of the Act by a sale in excess of a maximum price:

> "the person who buys such commodity for use or consumption other than in the course of trade or business may bring an action . . . . If . . . . the buyer is not entitled to bring suit or action under this subsection, the Administrator may bring such action under this subsection on behalf of the United States."

It is our contention that the purchaser in this case was a "person who buys such commodity for use or consumption other than in the course of trade or

business". Therefore the purchaser was the only party entitled to bring this action.

Second: It is agreed that the sales price was $2800. We agree that *if only a used tractor had been sold,* and if MPR 136 applied, there would have been an overcharge "in the approximate amount of $462.50" (see Appellant's Brief page 17, quoting from the court's findings), but it is our contention that other personal property was likewise sold as a part of the same sale and that all the property sold had such a value that, even if MPR 136 be held to apply, the sales price was below the maximum provided by that regulation. To a limited extent it was conceded at the trial (R 134) that property in addition to the tractor was involved in the sale, but as we construe Appellant's Brief even this concession is now withdrawn.

Third: Neither MPR 136, nor any other Maximum Price Regulation applies. Though we elaborated upon this contention before the trial court (R 120-6) it, like our second contention, has been disregarded by Appellant.

ARGUMENT

1. Appellant is Not the Proper Party Plaintiff.

As indicated above, and also in Appellant's Brief (pages 7-8), the question here is whether the purchaser was a "person who buys such commodity for use or consumption other than in the course of trade or business". The purchaser was an ultimate consumer. He purchased for use in connection with his logging operations. He did not purchase for resale.

In addition to *Lightbody v. Russell,* 45 NY Supp. (2nd) 515, 47 NY Supp. (2nd) 711 (R 114-5), which has since been reversed by the Court of Appeals of New York, 293 NY 492, 58 NE (2d) 508, we referred the trial court to the following authorities clearly holding that in a case like the present one the Administrator has no cause of action:

> *Brown v. Malloy* (ED. Pa.) 2 OPA Op. and Dec. 2112 (R 115) (Sale of tractor to farmer)
>
> *Bowles v. Googins* (DC Utah 1944) 2 OPA Op. and Dec. 2049 (R 117) (Sale of pipe for irrigating purposes)

We also relied upon the language of Judge Goodman of the Northern District of California in *Bowles v. Chew,* 53 Fed. Supp. 787. The purchasers in that case were retailers purchasing for resale and the court properly held that the Administrator had the cause of action, but the language of the court (53

Fed. Supp. at p. 791) clearly indicated that in the case of a purchase by an ultimate consumer, he alone has the cause of action and that the Administrator has the cause of action only when the purchase is by "trades men, i.e., merchants engaged in business, buying and selling between themselves" (R 109-11). Another case to the same effect, referred to by us at the trial was *Bowles v. Joseph Denunzio Fruit Company,* 55 Fed. Supp. 9 (R 112-3).

Since the trial of this case the following decisions have been handed down, all holding that in a case like the present one the Administrator (prior to the June, 1944 amendment) had no cause of action:

Bowles v. Whayne (WD Ky.) 60 Fed. Supp. 78 (Sale of dragline machine to mining company)

Bowles v. Schille (US Dis. Ct. ED Wis.) 2 OPA Op. and Dec. 2336 (Sale of truck to farmer)

Bowles v. Madl, et al. (DC D. Kans.) 60 Fed. Supp. 152 (Sale of farm machinery)

Morgan Sash and Door Co. v. Cullins Lumber Co. (Sup. Ct. Okla.) 159 Pac. (2d) 233 (Court held Administrator and not purchaser had cause of action, but reasoning supports our contention)

None of the above cases are referred to in Appellant's Brief.

That brief properly points out that at the trial we referred to the District Court's opinion in *Brown v. Glick Brothers Lumber Co.,* 52 Fed. Supp. 913, later

reversed by this Honorable Court in *Bowles v. Glick Brothers Lumber Co.,* 146 Fed. (2d) 566. However, we believe we can properly point out that we at that time expressly disagreed with the reasoning of that court, even though it strongly favored our position. We stated that "I don't urge it upon your Honor as being a sound case because I just don't agree with the reasoning of it" (R 106) but that we desired "to call your Honor's attention to the fact that the attorneys for the OPA in this case [i.e. the Glick case] were making exactly the argument I am making here." And also because other courts in criticizing the Glick decision set forth arguments "exactly in accordance with our contentions".

Those contentions made by the attorneys for the Administrator before the District Court in the Glick case, but now repudiated, were summarized by the court as follows (52 Fed. Supp. at page 916):

> "It is the contention of the attorneys for the Administrator that a person who buys a commodity at retail may bring an action for treble damages, but that a retailer, who has had to overpay his wholesaler or producer, cannot bring such an action, and that such right belongs exclusively to the Administrator.
>
> . . . . . .
>
> "This is so, say the attorneys for the Administrator, because the retailer's purchase of the sugar is 'in the course of trade or business,' and that the retailer's sale to the consumer is 'other than in the course of trade or business'."

And, as we pointed out to the trial court (R 109-12), this is the line of reasoning adopted by the court in *Bowles v. Chew,* supra, 53 Fed. Supp. 787.

Nor did this court hold to the contrary in *Bowles vs. Glick Brothers Lumber Co.,* 146 Fed. (2d) 566. The opinion of this court in that case, as well as the opinions in the *Chew* case and others are analyzed by Judge Vaught of the Federal District Court of Kansas in *Bowles v. Madl,* 60 Fed. Supp. 152. Because the Administrator in that case, as in the present case, relied upon the *Glick Brothers* case the court said "the analysis by the court became highly material". After such analysis the court stated that *Speten vs. Bowles,* 146 Fed. (2d) 602, also relied upon by Appellant in this case (R 12, 18) "is in direct conflict with the case of *Bowles v. Glick Brothers Lumber Company* supra".

The court in the above case of *Bowles v. Madl* said (60 Fed. Supp. at pp. 153):

> "Trade or business as used in the Act means buying, selling, exchanging, or handling articles in any manner for profit. Technically, it might be said that farming is a trade or business but the generally accepted designation is occupation. I see no reason why even if one were engaged in a trade or business and bought articles for use or consumption therein, he would not come under the use or consumption clause. The act uses the phrase 'course of trade or business', clearly indicating that it was the intention of Congress to recognize as one class those who use or consume as ultimate consumers, and as another class

those who trade, traffic, exchange, buy or sell for profit."

2. The Sales Price was Not in Excess of the Maximum.

As pointed out above Appellant's Brief proceeds on the theory that the only thing that was sold was a tractor. It thus proceeds despite the fact that Appellant's Statement of Points (R 140-142) states that "other personal property", in addition to the tractor, was sold.

A copy of the Bill of Sale is in evidence, Plaintiff's Exh. 1 (R 75-7), and the court will notice that it is a sale of:

> "One Allis-Chalmers Tractor Serial No. WKO 3982 Motor No. 8949. Together with armor—Bull hook and Miscellaneous Parts & Wrenches."

The evidence is clear that the "armor—Bull hook and Miscellaneous Parts and Wrenches" were actually sold by Trullinger to Gilmore (R 79-89). It was not denied by Gilmore, the purchaser (R 29, 42-4).

This tractor was purchased by appellee from a farmer in eastern Oregon (R 78) in 1942. During that year Trullinger spent approximately $500 for new parts for the tractor (R 79, 81, defendant's Exh. 2). He used it for approximately thirty or thirty-five days in the season of 1942. In 1943 he put on a new set of tracks at a cost of $250.00 (R 81-3) and other new parts costing approximately $250.00, making a total of approximately $500 in new parts in 1943.

Subsequent to placing the new parts on the tractor it was not used at all—"it never turned a wheel" (R 82). This amount of $500 for new parts in 1943 does not include labor, which was worth from $400 to $500 (R 84). When the tractor was sold there were sold with it an armor guard of a conceded value of $85.00 (R 134), a bull hook of a conceded value of $25.00 (R 134), 2 grease guns and some miscellaneous accessories (R 89-9). In addition to all this the used parts that had been taken from the tractor when they were replaced by new parts were likewise sold as replacements (R 84).

Appellant's witness McQuiston, an Allis-Chalmers representative, testified that the nearest comparable diesel tractor now has a list price of $4250, f.o.b. factory (R 57).

As we understand it, although Appellant's Brief does not mention the matter, it is Appellant's contention that the maximum price for which this tractor could be sold was 55% of the list price new of a comparable tractor f.o.b. factory. The $462.50 alleged overcharge referred to in Appellant's Brief (page 17) and also in the court's findings (R 11) was obviously arrived at as follows:

Sales Price	$2800.00
Price of new comparable Tractor f.o.b. factory $4250.00	
55% of new price	2337.50
Alleged over charge	$ 462.50

But this does not take into consideration any of the personal property—the armor guard, $85.00; the bull hook, $25.00; the grease guns, $35.00; the new track, $250; nor any of the miscellaneous parts or wrenches, of which there was no testimony as to value.

Under the above facts, Appellant certainly proved no case that the sales price of all this personal property was in excess of any maximum fixed by the OPA.

3. Maximum Price Regulation No. 136 does Not Apply.

Appellee was charged in the complaint, and is now charged, with violating Maximum Price Regulation No. 136. This regulation purports to cover "machines and parts and machinery services". It consists of 26 large pages of exceedingly fine print. But at this late stage of the proceedings Appellant has never pointed out the exact provisions of this lengthy regulation that he claims were violated. He did not do it at the trial. He has not done it in his brief in this court.

Though we found it almost an impossible task, we endeavored to analyze this long, detailed regulation, and we presented our analysis to the trial court (R 120-5). Appellant had three attorneys representing him at the trial, and three additional counsel appear on the brief, but at no time did anybody representing Appellant point out the language of the regulation that it is claimed had been violated.

One would expect a tractor to be listed under the heading "Prime Movers", or possibly "Industrial and Marine Power Apparatus", or if not there, then under "Processing Machinery and Equipment" (MPR 136, page 18). But it is not listed under any of these designations.

One would hardly expect a tractor, originally used by a farmer, and now used by a small logger, to be listed under "Construction and Mining Machinery", but this is the only place that any tractor is listed (MPR 136, page 19). There we find "Crawler and Non-Agricultural Tractors". We assume, because it has a track, that the tractor involved is a "crawler" type of tractor, but it can hardly be designated a "Non-Agricultural Tractor", for the evidence is that it was originally used by a farmer.

Then on page 2 of the regulations, paragraph 1390.2, are listed "Exclusions". Under these exclusions it is stated that the regulation does not apply to:

> "(f) Any sale or delivery at retail of a machine or part by a person other than the manufacturer thereof . . . . . "

But later in the paragraph a sale "at retail" is defined as "when made to an ultimate consumer, other than an industrial, commercial, or governmental user . . . . . "

As pointed out at the trial (R 124-6) it is very doubtful whether Gilmore, the purchaser, can come

under the designation of "an industrial, commercial, or governmental user". *State, ex rel, vs. Smith,* 111 SW (2d) 513; *North Whittier Citrus Association vs. National Labor Relations Board,* 109 Fed. (2d) 76 (9th Circ.).

We do not believe we are justified, in the absence of any analysis by Appellant, in devoting more space to a discussion of all the provisions of this lengthy MPR 136. We merely express the hope that at some time the Office of Price Administration will explain to appellee the exact language of the lengthy regulation which he is claimed to have violated, or explain why the court was in error when it found that "in said sale by defendant there was no violation by him of Maximum Price Regulation No. 136" (R 11).

CONCLUSION

We very much regret that Appellant's Counsel did not see fit either at the trial or in their brief in this court to discuss the second and third contentions set forth above. After all, the burden should be on them to prove that a violation has taken place, and not upon the citizen complained against to prove the contrary.

If the court holds with Appellee on any one of his three contentions, the judgment of the trial court should be affirmed. If the court disagrees with all our contentions, we, of course, agree with Appellant that

the case should be remanded for the purpose of assessing damages (Appellant's Brief 17-8).

Respectfully submitted,

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